JOHN CORNYN
TEXAS

United States Senate

WASHINGTON, DC 20510–4305

January 14, 2005

Sean Patrick Roche
Allen Chair Editor
University of Richmond Law Review
T.C. Williams School of Law
Room 301
University of Richmond, Virginia 23173

Dear Mr. Roche:

I am honored that the University of Richmond Law Review has seen fit to republish a series of articles I have previously published on National Review's website, and grateful that National Review Online has consented to this republication. As a member of the Senate Judiciary Committee and the outgoing chairman of the Senate Subcommittee on the Constitution, Civil Rights and Property Rights, I firmly believe in the importance of the process by which we select federal judges, and I am pleased that the Law Review has seen fit to dedicate its prestigious Allen Chair Symposium to this worthy and controversial topic.

The past two years has seen unprecedented acrimony and obstruction in the process by which we select our federal judges. The United States Senate convened an historic round-the-clock debate on judicial nominations from Wednesday, November 12 through Friday, November 14, 2003. In the middle of that debate, I published an op-ed responding to various arguments put forth by certain leading Senate Democrats in defense of the filibuster of judicial nominations. That op-ed is still available online at http://www.nationalreview.com/comment/cornyn200311131044.asp to help anyone interested in following any of the hotlinks provided within the article.

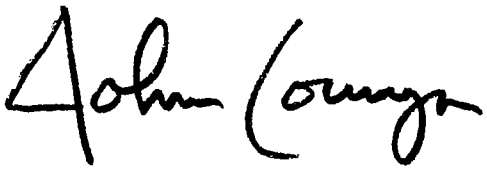
On November 23, 2004, just weeks after the 2004 elections, I published another op-ed in response to increasing speculation that a vacancy on the U.S. Supreme Court will arise sometime during the 109th Congress. That op-ed criticized the unfair and harsh attacks that are frequently launched against two sitting justices – Justices Antonin Scalia and Clarence Thomas. The op-ed also advocated a fair and reasonable process for determining the qualifications of a future Supreme Court nominee. That op-ed is also available at http://www.nationalreview.com/comment/cornyn200411230833.asp.

Finally, on January 4, 2005, the opening day of the 109th Congress, I published an op-ed suggesting that the new year and the new Congress provide a perfect opportunity for the Senate to resolve to reform its broken judicial confirmation process. That op-ed criticized the frequent use of double standards against this President's judicial nominees during the past four years. In particular, that op-ed analyzed what it means to hold "mainstream" views on abortion and other topics, and explained that it is the radical

alteration of the Senate confirmation process through the aggressive use of the filibuster – and not the attempt to restore Senate tradition by traditional means – that truly constitutes a "nuclear" tactic. That op-ed remains available at http://www.nationalreview.com/comment/cornyn200501040730.asp.

I hope that your readers will enjoy these articles. There are many sensitive public policy issues that divide Americans, but all Americans should agree that those issues should be resolved democratically, not judicially, and that we need a fair process for confirming fair judges. I commend the University of Richmond Law Review for dedicating its Allen Chair Symposium to this important and timely topic, and I look forward to a continued robust debate.

Sincerely,



JOHN CORNYN
United States Senator

FALSITIES ON THE SENATE FLOOR *

The Honorable John Cornyn **

Throughout last night's historic round-the-clock session of the United States Senate, a partisan minority of senators defended their filibusters against the President's judicial nominees by making two basic arguments. Both were false.

First, they claim that the Senate's record of "168-4"—168 judges confirmed, 4 filibustered (so far)—somehow proves that the current filibuster crisis is mere politics as usual.[1] But, as I explained in an op-ed yesterday, this is not politics as usual; it is politics at its worst.[2]

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* An earlier version of this Article was originally published on the National Review Online website on November 13, 2003. John Cornyn, *Falsities on the Senate Floor*, NAT'L REV. ONLINE, Nov. 13, 2003, *at* http://www.nationalreview.com/comment/cornyn20031113 1044.asp (last visited Dec. 29, 2004).

** United States Senator (R-TX) and Chairman, Subcommittee on the Constitution, Civil Rights and Property Rights, Committee on the Judiciary, United States Senate; Attorney General, State of Texas, 1999–2002; Justice, Supreme Court of Texas, 1991–1997. B.A., 1973, Trinity University; J.D., 1977, St. Mary's University School of Law; LL.M., 1995, University of Virginia School of Law.

1. *See, e.g.*, 149 CONG. REC. S14,533 (daily ed. Nov. 12, 2003) (statement of Sen. Schumer); *see also* 149 CONG. REC. S14,538–39 (daily ed. Nov. 12, 2003) (statement of Sen. Schumer).

Since November 12, 2003, the Democrats have filibustered six more judicial nominees, to increase the total to ten.

For a recent update on the status of the filibustered nominees and President Bush's resilient efforts to get his qualified nominees confirmed, see Michael F. Fletcher & Helen Dewar, *Bush Will Renominate 20 Judges; Fights in Senate Likely over Blocked Choices*, WASH. POST, Dec. 24, 2004, at A1.

2. John Cornyn, *Commentary: Obstruction and Destruction Plague Judicial Nominees*, L.A. TIMES, Nov. 12, 2003, at B11 ("The attacks on nominees aren't politics as usual, they are politics at its worst."). In this same op-ed I wrote:

> Consider another shameful filibuster record in our nation's history—the blockading of civil rights legislation. During the presidency of Franklin Delano Roosevelt, civil rights were denied four times. In that time, Congress enacted, by my count, 4,473 other pieces of legislation. Is "4,473-4" a record to be proud of—one in which "only" four civil rights bills were filibustered?
>
> During Lyndon Johnson's White House tenure, nearly 2,000 bills were enacted. "Only" three civil rights bills were subjected to filibuster (although two

After all, it is wrong for a partisan minority of senators to treat good people like statistics; wrong to mistreat distinguished jurists with unprecedented filibusters and unconscionable character attacks; wrong to hijack the Constitution and seize control of the judicial-confirmation process from the President and a bipartisan majority of the Senate; wrong to deny up-or-down votes to judicial nominees simply because a partisan minority of senators cannot persuade the bipartisan majority to vote against a nominee; and wrong not to play fair, follow tradition, and allow a vote. Once is bad enough, and four unconstitutional filibusters is four too many.[3]

Second, they argue that the current filibusters are justified on the basis of precedent.[4] But in fact, the current filibusters are both unconstitutional and unprecedented.[5] Senate Democrats themselves have admitted as much.[6]

The Constitution expressly establishes supermajority voting requirements for authorizing treaties, proposing constitutional amendments, and other specific actions.[7] To confirm judicial nominees, by contrast, the Constitution requires only a majority vote—as the Supreme Court of the United States unanimously held in *United States* v. *Ballin*.[8]

No wonder, then, that filibusters have been roundly condemned as unconstitutional—by Democratic senators and leaders as well

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were eventually overcome). Is "1,931-3" something to be celebrated? Clearly not.

Id.

3. *See, e.g.*, John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 194–206 (2003).

4. *See, e.g.*, 149 CONG. REC. S14,557–59 (daily ed. Nov. 12, 2003) (statements of Sen. Schumer); *see also* 149 CONG. REC. S14,556 (daily ed. Nov. 12, 2003) (statement of Sen. Reid).

5. *See, e.g.*, Cornyn, *supra* note 3, at 194–206.

6. *See id*. at 198–99.

7. U.S. CONST. art. I, § 3, cl. 6 (requiring a two-thirds vote of the Senate for impeachment); U.S. CONST. art. I, § 5, cl. 2 (requiring a two-thirds vote of the Senate to expel members of Congress); U.S. CONST. art. I, § 7, cl. 2 (requiring a two-thirds vote of the Senate to override a presidential veto); U.S. CONST. art. II, § 2, cl. 2 (requiring a two-thirds vote of the Senate to approve treaties); U.S. CONST. art. V (requiring a two-thirds vote of the Senate to propose constitutional amendments).

8. 144 U.S. 1 (1892). The Court in *Ballin* declared:

> The general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations. . . . No such limitation is found in the federal constitution, and therefore the general rule of law of such bodies obtains.

Id. at 6.

as by prominent Democrats on the bench and in the legal academy.[9]

The current filibusters of judicial nominations are also unprecedented. 168-4? Try 0-4. Until now, every judicial nominee throughout the history of the Senate and of the United States of America, who has received the support of a majority of senators, has been confirmed.[10] Until now, *no* judicial nominee who has enjoyed the support of a majority of senators has ever been denied an up-or-down vote.[11] Indeed, until now, Democrat and Republican senators alike have long condemned *even the idea* of defeating judicial nominees by filibuster.[12]

During Wednesday night's historic session, however, a partisan minority of senators claimed precedent for their filibusters.[13] Embarrassed by public exposure of their destructive acts, this partisan minority would very much like to find support for their actions, no matter how implausible.

But Senate Democrats have already admitted—at least amongst themselves—that their current obstruction is unprecedented. In a November 3, 2003 fundraising e-mail to potential donors, my colleague, Jon Corzine, the chairman of the Democratic Senatorial Campaign Committee, acknowledged—indeed, he boasted—that the current blockade of judicial nominees is "unprecedented."[14]

It is dishonest for Senate Democrats to tell their donors one thing, and the American people another thing. My colleague from New Jersey is right that the current filibusters are unprecedented. And the alleged precedents now cited by Senate Democrats for the current filibusters are all false.[15]

9. *See, e.g.*, Cornyn, *supra* note 3, at 198–99; *see also* Press Release, Senator John Cornyn, Filibusters are Constitutional, Right? Not So, Say Prominent Democrats (May 9, 2003), *at* http://www.cornyn.senate.gov/record_jc.cfm?id=222194 (last visited Feb. 8, 2005).

10. *See, e.g.*, Cornyn, *supra* note 3, at 218–26.

11. *See, e.g.*, *id*. at 223–26.

12. *See, e.g.*, *id*. at 198–211; Press Release, Senator John Cornyn, A Tradition of Restraint: Democrats and Republicans Alike Opposed Judicial Filibusters in the Past (Nov. 13, 2003), *at* http://www.cornyn.senate.gov/record_jc.cfm?id=225342 (last visited Feb. 1, 2005).

13. *See supra* note 4.

14. Email from Senator Jon Corzine, Chairman, Democratic Senatorial Campaign Committee, to potential Democratic Senatorial Campaign Committee donors (Nov. 3, 2003) (on file with author) ("Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.").

15. *See, e.g.*, Cornyn, *supra* note 3, at 218–26.

For example, some say that the current filibusters are justified because of the previous treatment of Stephen Breyer, Rosemary Barkett, H. Lee Sarokin, Richard Paez, and Marsha Berzon.[16]

That is a rather bizarre argument to make. Breyer, Barkett, Sarokin, Paez, and Berzon were *all* confirmed by the U.S. Senate: Breyer became a judge on the United States Court of Appeals for the First Circuit and he was later elevated to the Supreme Court of the United States;[17] Barkett now sits on the Eleventh Circuit;[18] Paez[19] and Berzon[20] are now judges on the Ninth Circuit; and Sarokin served as a judge on the Third Circuit until he retired in 1996.[21]

Indeed, Paez was confirmed only because *Republican senators refused to filibuster his nomination*.[22] Fewer than sixty senators ultimately voted to confirm Paez.[23] But although his opponents could have filibustered him, Paez got a vote—and his judgeship—because Republican senators understood it is wrong to filibuster judicial nominees.[24]

16. *See, e.g.*, Cornyn, *supra* note 3, at 224–26; *see also* 149 CONG. REC. S14,556 (daily ed. Nov. 12, 2003) (statement of Sen. Durbin); 149 CONG. REC. S5910–11 (daily ed. May 8, 2003) (statement of Sen. Leahy).

17. *See* 126 CONG. REC. 33,013 (1980) (showing that on December 9, 1980, Stephen Breyer was confirmed by the United States Senate to be a judge on the United States Court of Appeals for the First Circuit by a vote of 80-10); 140 CONG. REC. 18,704 (1994) (showing that on July 29, 1994, Stephen G. Breyer was confirmed by the United States Senate to be an Associate Justice of the Supreme Court of the United States by a vote of 87-9).

18. *See* 140 CONG. REC. 7539–40 (1994) (confirming Rosemary Barkett to the United States Court of Appeals for the Eleventh Circuit by a vote of 61-37).

19. *See* 146 CONG. REC. 2422 (2000) (confirming Richard Paez to the United States Court of Appeals for the Ninth Circuit by a vote of 59-39).

20. *See* 146 CONG. REC. 2422 (2000) (confirming Marsha Berzon to the United States Court of Appeals for the Ninth Circuit by a vote of 64-34).

21. *See* 140 CONG. REC. 27,538 (1994) (confirming H. Lee Sarokin to the United States Court of Appeals for the Third Circuit by a vote of 63-35).

22. *See, e.g.*, Cornyn, *supra* note 3, at 224–25; *see also* 146 CONG. REC. 2422 (2000). When Senator Trent Lott brought up the appeals court nominations of Richard Paez and Marsha Berzon for a vote, he said: "I do not believe that filibusters of judicial nominations are appropriate and, if they occur, I will file cloture and I will support cloture on the nominees." 146 CONG. REC. 14,503 (1999) (statement of Sen. Lott). When the Senate eventually considered the nominations, Senator Orrin Hatch made the same argument. *See* 146 CONG. REC. S1296 (daily ed. Mar. 8, 2000) (statement of Sen. Hatch) ("It is quite another story, however, for members of [the Senate] to frustrate a majority vote on these nominees by forcing a super-majority cloture vote.").

23. *See, e.g.*, Cornyn, *supra* note 3, at 225; *see also* 146 CONG. REC. 2422 (2000) (showing that Judge Paez was confirmed by a vote of 59-39).

24. *See, e.g.*, Cornyn, *supra* note 3, at 224–26; *see also supra* notes 22–23 and accompanying text.

I would love to see Pryor, Owen, Pickering, and Estrada "mistreated" the same way Breyer, Barkett, Sarokin, Paez, and Berzon were treated. If you take the Democrats' argument seriously, then Pryor, Owen, Pickering, and Estrada must be confirmed.

Some argued that the current filibusters are justified because of the failed 1968 nomination of then-Justice Abe Fortas to be Chief Justice.[25]

This claim is also unfounded. *The Congressional Record* makes clear that a confirmation vote would have likely failed by a vote of 46-49.[26] Moreover, Fortas's opponents explained repeatedly that they were *not* filibustering—they just wanted adequate time to debate and expose serious problems with his nomination.[27] So Fortas was not denied confirmation due to a filibuster; he was denied confirmation due to the opposition of a bipartisan majority of senators.[28] (Indeed, shortly thereafter, Fortas resigned from the Court altogether, under threat of impeachment.)[29]

Finally, some say that the current filibusters are justified because some of President Clinton's nominees were held in committee.[30]

25. *See, e.g.*, Cornyn, *supra* note 3, at 218–23.

26. *See, e.g.*, *id*. at 220–22; *see also* 114 CONG. REC. 28,929, 28,933, 29,150 (1968) (providing statements of various senators indicating that the confirmation of Justice Fortas likely would have failed by a vote of 46-49).

27. *See, e.g.*, Cornyn, *supra* note 3, at 220; Letter from Robert P. Griffin, former U.S. Senator, to Senator John Cornyn, Chairman, Senate Subcommittee on the Constitution (June 2, 2003), *in Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary,* 108th Cong., 1st Sess. 220–21 (May 6, 2003), *available at* http://www.gpoaccess.gov/databases.html (last visited Feb. 4, 2005); *see also* Press Release, Senator John Cornyn, Fortas Was Not Filibustered (Nov. 13, 2003), *at* http://cornyn.senate.gov/111303quotes.html (last visited Dec. 29, 2004).

28. *See supra* notes 26–27 and accompanying text.

29. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 218–19 (rev. ed. 1999). As Professor Abraham describes in his book, Justice Fortas engaged in a series of potentially improper activities while serving as a Justice on the Supreme Court of the United States. Among other things, Justice Fortas is known to have engaged in "extrajudicial active counseling of [President Lyndon Johnson]" and charges of judicial impropriety also arose after evidence surfaced that Justice Fortas had accepted generous lecture and consulting fees. *Id.* at 219. On May 4, 1969, Justice Abe Fortas resigned from the Supreme Court of the United States under pressure from the recently-elected President Richard Nixon and Attorney General John N. Mitchell. *Id.*

30. *See* 148 CONG. REC. S7017 (daily ed. July 18, 2002) (statement of Sen. Leahy) ("Large numbers of vacancies continue to exist on many Courts of Appeals, in large measure because the recent Republican majority was not willing to hold hearings or vote on more than half—56 percent—of President Clinton's Courts of Appeals nominees in 1999 and 2000.").

But there is nothing new—or relevant—about a judicial nominee who is not confirmed due to lack of support from a Senate majority. At the end of the first Bush Administration, there were fifty-four judicial nominees who had not mustered majority support and thus were not confirmed.[31] At the end of the Clinton Administration, there were forty-one such nominees.[32] If a majority of senators chooses to defer to a committee's decision not to bring someone to a vote, that is the majority's right under our constitutional system for confirming judges.

The current situation is precisely the *opposite*. Today, an enthusiastic bipartisan majority wants to confirm judicial nominees, yet for the first time in our nation's history, a minority is stopping them.

That's why Georgetown Law Professor Mark Tushnet—no shill for President Bush's judicial nominees—has written that filibusters are clearly different from the holds and committee delays used against nominees from the earlier Bush and Clinton administrations. He has written that

> there's a difference between the use of the filibuster to derail a nomination and the use of other Senate rules—on scheduling, on not having a floor vote without prior committee action, etc.—to do so. All those other rules . . . can be overridden by a majority vote of the Senate . . . whereas the filibuster rule can't be overridden in that way. A majority of the Senate could ride herd on a rogue Judiciary Committee chair who refused to hold a hearing on some nominee; it can't do so with respect to a filibuster.[33]

He has also written that "[t]he Democrats' filibuster is . . . a repudiation of a settled pre-constitutional understanding."[34]

The arguments being peddled in defense of the filibusters resemble the arguments against the nominees themselves. They are baseless and outcome-oriented. They have been rejected by a bipartisan majority of senators and they are offensive to basic principles of democracy, including majority rule and the right to vote.

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31. *See* Cornyn, *supra* note 3, at 192 n.39.

32. *Id*. (stating that "there were 41 nominees pending in the Senate as of December 31, 2000—near the close of President Clinton's second and final term in office").

33. *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary,* 108th Cong., 1st Sess. 72–73 (May 6, 2003) (testimony of Dr. John Eastman, Professor of Law, Chapman University School of Law) (quoting an e-mail from Professor Tushnet), *available at* http://www.gpoaccess.gov/databases.html (last visited Feb. 4, 2005); *see also* Cornyn, *supra* note 3, at 226.

34. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 526 (2004).

Senator Zell Miller, a long-time Democrat from the state of Georgia, recently published a book about the demise of his party, entitled *A National Party No More*.[35] Perhaps that is because the Democratic Party is a democratic party no more.

35. ZELL MILLER, A NATIONAL PARTY NO MORE: THE CONSCIENCE OF A CONSERVATIVE DEMOCRAT (2003). Senator Miller's book contains a chapter specifically critical of the Democratic filibuster of judicial nominations. *Id.* at 81–88.

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STANDARDS FOR THE SUPREME COURT *

The Honorable John Cornyn **

One important lesson learned during this past election year is that the American people want a return to basic American values, and an end to vicious, Michael Moore-style politics. Certainly the last thing Americans want is yet another year of incessant, baseless, and venomous attacks.

But if liberal special-interest groups in Washington have their way, more vicious politics is exactly what the American people will get, particularly in the likely event of a vacancy on the Supreme Court of the United States.

* * *

The American people want judges and justices on the bench who will dutifully interpret the law—distinguished legal minds and devoted public servants who will help implement, not make, political decisions, and who know the difference between personal opinion and professional duty.

But some special-interest groups do not want that. Having failed to advance their policies democratically at the ballot box in November, these groups now hope to achieve their ends in the courtroom and to impose their views on the country by judicial fiat.

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* An earlier version of this Article was originally published on the National Review Online website on November 23, 2004. John Cornyn, *Injudicious Battles: Is There Any Stopping the Judge Madness in the Senate?*, NAT'L REV. ONLINE, Nov. 23, 2004, *at* http://www.nationalreview.com/comment/cornyn200411230833.asp (last visited Jan. 15, 2005).

** United States Senator (R-TX) and Chairman, Subcommittee on the Constitution, Civil Rights and Property Rights, Committee on the Judiciary, United States Senate; Attorney General, State of Texas, 1999–2002; Justice, Supreme Court of Texas, 1991–1997. B.A., 1973, Trinity University; J.D., 1977, St. Mary's University School of Law; LL.M., 1995, University of Virginia School of Law.

Of course, they will not say so in public. Instead, they will try to distort the records of this President's well-qualified judicial nominees in an effort to defeat their confirmation.

One favorite tactic has been to attack the two distinguished jurists whom President Bush has frequently heralded as models of jurisprudence: Antonin Scalia and Clarence Thomas.[1] The judicial philosophy of these two fine Justices—a philosophy that respects and promotes democracy and returns decision-making to the people and to the states, rather than set national policy by judicial fiat—has even been condemned as downright hostile to civil rights.[2]

But consider the source of these attacks.

These are the same groups who claim that your civil rights are being violated whenever a public-school teacher recites the Pledge of Allegiance,[3] a county clerk issues a wedding license only to the union of one man and one woman,[4] or a soldier allows a Boy Scout troop onto a military base.[5]

These are the same groups that seek judges who will ignore the three-strikes-and-you're-out law when sentencing convicted criminals,[6] invalidate consensus laws like the partial-birth-abortion

1. *See* Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. TIMES, Mar. 29, 2002, at A24 (noting that Bush has "singled out Justices Antonin Scalia and Clarence M. Thomas . . . as justices whom he held in high regard").

2. *See, e.g.*, Saveourcourts.org, *The Scalia-Thomas Record on Civil Rights and Equal Opportunity*, *at* http://saveourcourts.civilrights.org/the_facts/scalia_thomas.html (last visited Jan. 23, 2005) (describing Justice Scalia and Thomas as having "extreme views" on civil rights issues).

3. *See* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004); *see also* Press Release, American Civil Liberties Union, ACLU Urges Supreme Court to Uphold Ruling Removing the Phrase "Under God" from Pledge of Allegiance Recited in Public Schools (Mar. 24, 2004), *at* http://www.aclu.org/court/court.cfm?ID=15298&c=261 (last visited Jan. 23, 2005).

4. *See* Christina Bellantoni, *ACLU Sues to Allow Gay "Marriage,"* WASH. TIMES, July 8, 2004, at B1.

5. *See* Associated Press, *Military Bases are Told Not to Sponsor Boy Scout Troops*, WASH. POST, Nov. 16, 2004, at A8.

6. *See* Press Release, American Civil Liberties Union, After High Court Upholds Harsh "Three Strikes" Sentencing Law, ACLU of Southern CA Vows Reform Efforts (Mar. 3, 2003), *at* http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=12054&c=52 (last visited Feb. 7, 2005) (stating that the ACLU national office and its California affiliate served as co-counsel for the defendant in *Lockyer v. Andrade*, 538 U.S. 63 (2003), one of two Supreme Court cases attempting to invalidate the California "three strikes" law). The Supreme Court also upheld the "three strikes" law in the *Andrade* companion case, *Ewing v. California*, 538 U.S. 11 (2003).

ban,[7] and block school-choice programs designed to expand educational opportunities to minority communities.[8]

Moreover, their analysis of the law is as flawed as their views on policy. Consider these examples:

a) *Rights of the Accused*. The judicial philosophy of Justices Scalia and Thomas has led to numerous decisions favoring criminal defendants, notwithstanding the contrary views of some of their colleagues. In *Blakely*[9] and *Apprendi*,[10] they authored or joined 5-4 majorities recognizing a robust right to jury trial under the Sixth Amendment. In *Kyllo*,[11] Justice Thomas joined Justice Scalia's 5-4 majority opinion expanding Fourth Amendment protections against government searches based on new technologies.[12] Justice Scalia's dissent in *Maryland* v. *Craig*,[13] decided before Justice Thomas joined the Court, championed a broader Sixth Amendment right of criminal defendants to confront their accusers than that ultimately adopted by the Court.[14]

b) *Employment Discrimination*. Fidelity to text and precedent has also led Justices Scalia and Thomas to favor employees in numerous employment discrimination cases. For example, they advocated a broader interpretation of the federal Age Discrimination in Employment Act favoring the employee, and dissented from the Court's decision in favor of the employer in *Cline*.[15] Both Justices

7. *See* Press Release, American Civil Liberties Union, ACLU and National Abortion Federation Vow to Defend Federal Abortion Ban Victory as DOJ Pursues Appeal (Jan. 15, 2005), *at* http://www.aclu.org/news/NewsPrint.cfm?ID=17333&c=148 (last visited Jan. 23, 2005) (discussing the ACLU's attempts to repeal the Partial Birth Abortion Ban Act of 2003).

8. *See* Zelman v. Simmon-Harris, 536 U.S. 639 (2002) (listing the ACLU and People for the American Way Foundation as co-counsel and ruling against these groups in holding that Ohio's scholarship program was not a violation of the Establishment Clause and that Ohio could continue providing tuition-assistance to qualifying students irrespective of whether the students attended religious or secular schools).

9. Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004).

10. Apprendi v. New Jersey, 530 U.S. 466 (2000).

11. Kyllo v. United States, 533 U.S. 27 (2001) (holding that the use of a device that is not in "general public use" to explore the details of the home that would otherwise have been unknowable without physical intrusion qualifies as a "search" and is presumptively unreasonable without a warrant).

12. *Id*. at 40–41.

13. Maryland v. Craig, 497 U.S. 836, 860–61 (1990) (Scalia, J., dissenting) (arguing that the Constitution provides "with unmistakable clarity" that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against them").

14. *Id*. at 859–60 (holding that permitting an alleged sexual abuse victim to testify by closed circuit television would not violate the alleged perpetrator's Sixth Amendment right to confrontation).

15. Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 601–13 (2004) (Scalia, J., joined by Thomas, J., dissenting) (arguing against the Court's holding that the ADEA does not prohibit favoring the old over the young).

have authored a number of the Court's leading opinions faithfully construing race and sex employment discrimination laws in favor of employees, including *Oncale*,[16] *Costa*,[17] *Swierkiewicz*,[18] and *Robinson v. Shell Oil*.[19]

c) *First Amendment*. Justice Thomas has been recognized by legal scholars across the political spectrum as a stalwart champion of free speech,[20] while Justice Scalia provided the critical fifth vote in *Texas* v. *Johnson*,[21] the landmark flag-burning case issued prior to Justice Thomas's arrival on the Court. Justice Scalia joined Justice Thomas's 6-3 opinion in *Good News Club*[22] ensuring equal access to public-school facilities by a religious group as a matter of free speech, as they had similarly held in *Rosenberger*.[23] And both Justices joined the Court's 5-4 decision upholding the ability of minority communities to enjoy educational choice, including equal access to parochial schools.[24]

These and countless other decisions demonstrate how misleading it is to examine the work of judging through the narrow, partisan political lens advocated by these liberal special-interest groups. In fact, the job of a judge is to decide one case at a time, applying the existing law—whether a law written by Congress or a judicial precedent—to the facts, without regard to who wins or who loses. In other words, results-oriented decision-making is the oppo-

16. Oncale v. Sundown Offshore Servs., 523 U.S. 75 (1998) (holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII).

17. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (concluding that a "mixed-motive" jury instruction is allowed so long as the employee can present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice).

18. Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002) (holding that in order to survive a motion to dismiss an employee only needs to state a claim upon which relief could be granted and not plead more facts than ultimately needed to succeed on the merits).

19. Robinson v. Shell Oil, Co., 519 U.S. 337 (1997) (holding that the term "employee" in the Civil Rights Act of 1964 included former employees).

20. *See, e.g.*, David L. Hudson, Jr., *Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector*, 35 CREIGHTON L. REV. 485, 487 (2002) (stating that "Justice Clarence Thomas has evolved into an ardent defender of commercial free-speech rights, becoming an even more forceful advocate for commercial speech than his luminous predecessor [Justice Thurgood Marshall]").

21. Texas v. Johnson, 491 U.S. 397 (1989) (holding that burning the American flag is a protected form of political expression under the First Amendment).

22. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that the exclusion of a religious group from a limited public forum was a violation of the group's free speech rights and that no Establishment Clause concern justified the exclusion).

23. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (holding that the state university's exclusion of a student publication from participating in a student activities fund solely on the basis of the publications religious viewpoint was content discrimination and a violation of the First Amendment).

24. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

site of what a good judge does. No good judge twists the law or the facts to assure a particular outcome, and it is wrong for anyone to suggest that it is appropriate that they should.

Judges regularly find themselves on opposite sides of an issue; court decisions are often divided. Indeed, Justices Scalia and Thomas frequently disagree.[25]

But it's offensive and wrong to say that one Justice is hostile to civil rights while another Justice is pro-civil rights, just because they happen to disagree from time to time. For example, it's wrong to say that the cases noted above prove that Justices Scalia and Thomas are pro-civil rights, while their brethren are anti-civil rights, just because they happen to disagree in those cases.

* * *

The American people also want a fair and reasonable process for deciding who shall serve on the Supreme Court. Under our Constitution, that means nomination by the President and confirmation by a majority of the Senate. Throughout our nation's history, every judicial nominee who has received the support of a majority of senators has been confirmed.[26]

President Bush's nominees to the federal courts have enjoyed the support of a bipartisan majority of senators. Unfortunately, during this past Congress, a partisan minority of senators trampled upon two centuries of Senate tradition upholding the doctrine of majority rule. They have filibustered ten judicial nominees—for the first time in our nation's history—in order to prevent President Bush's nominees from receiving an up-or-down vote on the floor of the Senate.[27]

25. *See, e.g.*, Will Baude, *Brothers in Law?*, THE NEW REPUBLIC ONLINE (June 30, 2004), *at* http://www.tnr.com/doc.mhtml?pt=Vyn1WOmi2qD22%2Fvce1byER%3D%3D (last visited Jan. 23, 2005) (describing notable jurisprudential disagreements between Justices Scalia and Thomas, including the recent *Hamdi v. Rumsfeld* and *Ashcroft v. ACLU* decisions, and stating that "Thomas regularly breaks with Scalia, disagreeing on points of doctrine, finding a more measured and judicial tone, and calling for the elimination of bad law").

26. *See, e.g.*, John Cornyn, *Our Broken Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 224–25 (2003) (listing the recent judicial nominees who garnered the support of fewer than sixty senators yet the Senate still acted to confirm the nominee by the necessary majority).

27. *See, e.g.*, Charles Babington, *GOP Moderates Wary of Filibuster Curb*, WASH. POST, Jan. 16, 2005, at A5; Carl Hulse, *Frist Warns on Filibuster over Bush Nominees*, N.Y. TIMES, Nov. 12, 2004, at A21.

Some Senators are now even claiming that they should have a role in selecting the next nominee to the Supreme Court.[28] The President, of course, is entitled to consult with whomever he wants, but cooperation is a two-way street, and one can certainly understand a president's reluctance to take advice from those who have obstructed his finest nominees.[29]

Moreover, the Constitution is clear: The president, alone, nominates judges.[30] The Senate has an important advice-and-consent function, but that function applies only to the confirmation, and not the nomination, of judges.[31] Much has been made of the word "advice," but as early Senate practice teaches, the Senate's constitutional function is simply to "advise" whether it considers a particular appointment to be a good idea and, separately, to "consent" to that appointment regardless of the Senate's own advice. (For example, when the Senate, for the first time, exercised its advice-and-consent function with respect to a treaty, it resolved "[t]hat the Senate do consent to the said convention, and advise the President of the United States to ratify the same.")[32]

28. *See* Letter from Senator Edward M. Kennedy to President George W. Bush (June 25, 2003), *reprinted in From the Bag: Irrecusable & Unconfirmable*, 7 GREEN BAG 2d 277, 281–83 (2004), *available at* http://www.kennedy.senate.gov/index_high.html (last visited Feb. 2, 2005) ("I'm writing to express my hope that in considering potential nominees . . . you will consider the example of earlier Presidents who . . . fully respected the role the Framers gave the Senate to share with the President."); Letter from Senator Patrick Leahy to President George W. Bush (June 11, 2003), *at* http://www.leahy.senate.gov/press/200306/061603.html (last visited Feb. 2, 2005) ("I write to urge you to engage[] in meaningful consultation with Members of the Senate, including those in the other party, before deciding on nominees."); Letter from Senator Harry Reid to President George W. Bush (Dec. 3, 2004), *at* http://reid.senate.gov/record.cfm?id=229302 (last visited Feb. 2, 2005) ("[T]he power to make lifetime appointments to the Supreme Court and the lower federal courts is a shared power."); Letter from Senator Charles E. Schumer to President George W. Bush (June 10, 2003), *at* http://www.schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PR01772.html (last visited Feb. 2, 2005) ("The Constitution dictates that federal judges be nominated by the President with the advice and consent of the Senate.").

29. Letter from Senator John Cornyn to President George W. Bush (June 17, 2003), *reprinted in From the Bag: Irrecusable & Unconfirmable*, 7 GREEN BAG 2d 277, 283–84 (2004), *available at* http://cornyn.senate.gov/record.cfm?id=213077 (last visited Feb. 8, 2005).

30. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate . . . Judges of the supreme Court, and all other Officers of the United States.").

31. *Id*. ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . ."); *see also* John Cornyn, Editorial, *Advice and Consent -- After the Fact*, WASH. POST, July 1, 2003, at A12.

32. *See* 1 ANNALS OF CONGRESS 55 (Joseph Gales ed., 1834); *see also* David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 180 (1995) (describing the approval of the nation's first treaty, a consular agreement that Thomas Jefferson had concluded with France in November 1788).

When our last President, Bill Clinton, was presented with two vacancies on the Supreme Court, both of his nominees were given up-and-down votes and confirmed.[33] Neither was filibustered by a partisan minority—despite their clear liberal leanings. Both are distinguished jurists—one, a former general counsel of the American Civil Liberties Union who had written that traditional marriage laws are unconstitutional,[34] and the other, a former Democratic chief counsel of the Senate Judiciary Committee.[35]

Should President Bush be presented with a vacancy on the Supreme Court during his second term in office, his nominee should be granted at least that same courtesy.

* * *

A vacancy on the Supreme Court could occur at any time. A retirement could be announced at the end of the Court's session in June or July. Or one could be announced in March or April, as was done in 1993 and 1994, thereby giving the President and the Senate additional time to consider a nominee. Finally, a vacancy could arise tragically due to a medical problem.

But whatever the time frame for a Supreme Court vacancy, the process for selecting a successor must reflect the best of our American judiciary, and not the worst of American politics.

33. *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 316–26 (rev. ed. 1999) (describing the confirmations of Justices Ruth Bader Ginsburg and Stephen Breyer).

34. *See id*. at 319; RUTH BADER GINSBURG & BRENDA FEIGEN FASTEAU, REPORT OF COLUMBIA LAW SCHOOL EQUAL RIGHTS ADVOCACY PROJECT: THE LEGAL STATUS OF WOMEN UNDER FEDERAL LAW 72 (1974) (stating that bigamy law is "of questionable constitutionality since it appears to encroach impermissibly upon private relationships"); *see also* John Cornyn, *Restoring our Broken Judicial Confirmation Process*, 8 TEX. REV. L. & POL. 1, 17 n.50 (2003).

35. *See* ABRAHAM, *supra* note 33, at 323–24.

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DEBUNKING DOUBLE STANDARDS *

The Honorable John Cornyn **

At every new year, Americans traditionally reflect on the past, identify problems that need fixing, and adopt New Year's resolutions. In that same spirit, the Senate needs a New Year's resolution to fix its broken process for considering the President's judicial nominees. To do so, however, we must first recognize that liberal interest groups in Washington have prevented the Senate from confirming several of this President's judicial nominees for one simple reason: They don't want judges who will just apply the law as written.

These liberal interest groups want judges who will redefine marriage[1] and condemn the Boy Scouts,[2] expel the military from college campuses,[3] and purge the public square of expressions of faith.[4] They want courts to ignore the three-strikes-and-you're-out

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1. *See* Christina Bellantoni, *ACLU Sues to Allow Gay "Marriage,"* WASH. TIMES, July 8, 2004, at B1.

2. *See* Associated Press, *Military Bases are Told Not to Sponsor Boy Scout Troops*, WASH. POST, Nov. 16, 2004, at A8.

3. *See* American Civil Liberties Union of New Jersey, Defending Our Most Basic Freedoms, Forum for Academic and Institutional Rights (FAIR) v. Rumsfeld, U.S. Court of Appeals for the Third Circuit/Amicus, *at* http://www.aclu-nj.org/legal/legaldocket/freespeech/forumforacademicandinstitu.htm (last visited Feb. 21, 2005) (showing that the ACLU-NJ filed an amicus brief in *FAIR v. Rumsfeld* arguing that public law schools have a First Amendment right to bar military recruiters from their campuses and still enjoy the benefits of public funding).

4. *See* Brief of Amici Curiae of Americans United for Separation of Church and State, the American Civil Liberties Union, and People for the American Way Foundation et al. in Support of the Respondent, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (No.

law and give lenient sentences to convicted criminals,[5] block school-choice programs designed to expand educational opportunities to minority communities,[6] and require better treatment for terrorists than for ordinary Americans accused of a crime.[7] They want judicial activists who believe that our civil rights are violated anytime a public-school teacher recites the Pledge of Allegiance,[8] a county clerk issues a wedding license only to the union of one man and one woman,[9] a terrorist is denied access to cookware or athletic equipment,[10] or a Boy Scout troop is allowed onto a military base.[11]

These groups want judges who will impose their agenda on the nation by judicial fiat—regardless of what the American people

99-2036); Brief of Amicus Curiae of People for the American Way in Support of Petitioners, Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (No. 88-1597).

5. *See* Press Release, American Civil Liberties Union, After High Court Upholds Harsh "Three Strikes" Sentencing Law, ACLU of Southern CA Vows Reform Efforts (Mar. 3, 2003), *at* http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=12054&c=52 (last visited Feb. 7, 2005) (stating that the ACLU national office and its California affiliate served as co-counsel for the defendant in *Lockyer v. Andrade*, 538 U.S. 63 (2003), one of two Supreme Court cases attempting to invalidate the California "three strikes" law). The Supreme Court also upheld the "three strikes" law in the *Andrade* companion case, *Ewing v. California*, 538 U.S. 11 (2003).

6. Zelman v. Simmons-Harris, 536 U.S. 639 (2002). In *Zelman*, various liberal interest groups coordinated an attempt to invalidate an Ohio scholarship program aimed at revitalizing the State's struggling education system. *Id*. at 643–46. The interest groups argued that the scholarship program violated the Establishment Clause by providing a portion of the available tuition-assistance to qualifying students enrolled in private religious schools. *Id*. at 648–49. The Court held that the program was entirely neutral with respect to religion and that it provided benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. *Id*. at 662–63. In addition, the Court held that the scholarship program permitted individuals to exercise genuine choice among options public and private, secular and religious and therefore was not a violation of the Establishment Clause. *Id*.

7. *See, e.g.*, Amnesty International, Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay, Apr. 15, 2002, http://web.amnesty.org/library/Index/ENGAMR510532002 ("Amnesty International believes that those captured and held by the USA during the conflict in Afghanistan must be presumed to be prisoners of war, whether they belong to the Taleban or *al-Qa'ida*. The Taleban were effectively the armed forces of Afghanistan when the US military operations began in October 2001, and *al-Qa'ida* fighters appear to have been an integral part of such forces, thus fulfilling the requirements of Article 4(1) of the Third Geneva Convention.").

8. *See* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004); *see also* Press Release, American Civil Liberties Union, ACLU Urges Supreme Court to Uphold Ruling Removing the Phrase "Under God" from Pledge of Allegiance Recited in Public Schools (Mar. 24, 2004), *at* http://www.aclu.org/court/court.cfm?ID=15298&c=261 (last visited Jan. 23, 2005).

9. *See* Christina Bellantoni, *ACLU Sues to Allow Gay "Marriage*," WASH. TIMES, July 8, 2004, at B1.

10. *See supra* note 7; *see also* Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 26 & 38, 6 U.S.T. 3316, 75 U.N.T.S. 135, *available at* http://www.unhchr.ch/html/menu3/b/91.htm (last visited Feb. 21, 2005).

11. *See* Associated Press, *Military Bases are Told Not to Sponsor Boy Scout Troops*, WASH. POST, Nov. 16, 2004, at A8.

have said at the ballot box. And they will do anything to oppose judges who will not blindly rule in their favor.

The commencement of a new Congress this week provides the perfect opportunity for senators to resolve to reform the judicial-confirmation process. An important first step in reform, however, is recognizing that these liberal interest groups have invented a series of double standards to defeat this President's judicial nominees. The Senate must resolve to reject these absurd double standards and restore fair and traditional standards in the coming year.

I. MAINSTREAM VIEWS

First, liberal interest groups claim that judicial nominees must hold "mainstream," and not extreme, views.[12] Yet they applied a very different standard to Democrat nominees.

For example, prior to her service on the federal bench, Justice Ruth Bader Ginsburg—a distinguished jurist and liberal favorite—served as general counsel of the American Civil Liberties Union,[13] a liberal organization that has championed the abolition of traditional marriage laws and attacked the Pledge of Allegiance.[14] Before becoming a judge, Ginsburg expressed her belief that traditional marriage laws are unconstitutional, but that prostitution is a constitutional right.[15] She also wrote that the Boy Scouts and Girl Scouts are discriminatory institutions,[16] that courts must require the use of taxpayer funds to pay for abortions,[17] and that the

12. *See* Charles Babington, *GOP Moderates Wary of Filibuster Curb*, WASH. POST, Jan. 16, 2005, at A5 (discussing how Democrats desire judicial nominees to be within the "political mainstream").

13. *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 319 (rev. ed. 1999).

14. *See supra* notes 8–9 and accompanying text.

15. *See* RUTH BADER GINSBURG & BRENDA FEIGEN FASTEAU, REPORT OF COLUMBIA LAW SCHOOL EQUAL RIGHTS ADVOCACY PROJECT: THE LEGAL STATUS OF WOMEN UNDER FEDERAL LAW 72, 190–91 (1974) (stating that bigamy law is "of questionable constitutionality since it appears to encroach impermissibly upon private relationships" and that "[p]rostitution, as a consensual act between adults, is arguably within the zone of privacy protected by recent constitutional decisions"); *see also* John Cornyn, *Restoring our Broken Judicial Confirmation Process*, 8 TEX. REV. L. & POL. 1, 17 n.50 (2003).

16. *See* SEX BIAS IN THE U.S. CODE: A REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS 145–46 (1977) ("The Boy Scouts and Girl Scouts . . . perpetuate stereotyped sex roles"). This report was authored by Ruth Bader Ginsburg and Brenda Fagen Fasteau. For a more detailed analysis of this report and Justice Ginsburg's views on related issues, see Phyllis Schlafly, *How the Feminists Want to Change our Laws*, 5 STAN. L. & POL'Y REV. 65 (1994).

17. *See* Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1976 Term*, *in*

age of consent for sexual activity should be lowered to age twelve.[18]

Needless to say, many Americans do not consider these views to be mainstream—yet Senate Republicans and Democrats alike set aside such concerns and approved her nomination to the Supreme Court of the United States by a 96-3 vote.[19] By contrast, this President's judicial nominees—who hold views shared by millions of Americans and enjoy the support of a bipartisan majority of senators—suffer vicious attacks and unprecedented obstruction at the behest of liberal interest groups.

All senators should reject this double standard. We should consider nominees on the basis of their qualifications and judicial temperament—and not on the basis of some distorted conception of the political mainstream. We should examine their commitment to applying the law *regardless* of their personal beliefs—and not the actual content of those beliefs. And we should consider nominees based on the mainstream support of a bipartisan majority of the Senate—rather than the virulent opposition of a partisan minority of senators.

II. ABORTION POLITICS

Second, liberal interest groups claim that this President's judicial nominees must swear allegiance to certain views with regard to abortion.[20] Yet once again, they apply a very different standard to Democrat officeholders.

With the blessing of these groups, Senate Democrats have unanimously elected Senator Harry Reid as their new leader—even though he says he personally opposes abortion and has re-

CONSTITUTIONAL GOVERNMENT IN AMERICA 217–24 (1980) (criticizing the Supreme Court rulings denying the right to public funds for abortions and asserting that the restrictions on public funding for poor women is a "stunning curtailment" of women's rights); *see also* Schlafly, *supra* note 16, at 70–71 (concluding that based on Justice Ginsburg's publications and speeches, Justice Ginsburg believes that the government "has an affirmative duty to fund abortions").

18. *See* SEX BIAS IN THE U.S. CODE, *supra* note 16, at 102 ("[We must] eliminate the phrase 'carnal knowledge of any female, not his wife who has not attained the age of sixteen years' and substitute a federal, sex-neutral definition of the offense. . . . A person is guilty of an offense if he engages in a sexual act with another person . . . [and] the other person is, in fact, less than 12 years old."); *see also* Schlafly, *supra* note 16, at 68–69.

19. *See* ABRAHAM, *supra* note 13, at 319.

20. *See* Charles Babington & Mike Allen, *Two Issues May Deeply Divide Next Congress; Parties Are at Odds over High Courts, Social Security*, WASH. POST, Jan. 3, 2005, at A1 (discussing how "many liberal groups" will press Democrats to filibuster any of President Bush's nominees that are opposed to abortion).

peatedly refused to support *Roe* v. *Wade*.[21] Such personal views are shared by millions of Americans and certainly should not be a basis for denying high public office to otherwise qualified individuals. Yet these groups have done precisely that to several of this President's judicial nominees.

These groups have it exactly backwards. If anything, one's personal opinion on abortion (or any other issue) is even less relevant for judicial nominees than for United States senators. Judges are duty-bound to follow the law regardless of their personal views. By contrast, legislators are elected precisely because of their personal political views.

It is also worth noting that, while *Roe* has been on the books for over thirty years, the American people continue to support parental notification and consent laws and other consensus laws like the partial-birth-abortion law, and oppose mandatory public funding of abortion. Yet liberal interest groups file lawsuit after lawsuit demanding that judges reverse these popular and democratically enacted policies by judicial fiat,[22] and they oppose the appointment of judges who will not blindly rule in their favor.

Senators should consider judicial nominees on the basis of their qualifications and commitment to applying the law as it is written—regardless of their personal views on abortion or *Roe*—just as Senate Democrats recently set aside such views in electing their leader.

21. *See* 145 CONG. REC. 26,389 (1999), *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=1&vote=00337 (last visited Feb. 2, 2005) (showing that on October 21, 1999, Senator Harry Reid voted against the Harkin Amendment which endorsed the Supreme Court's decision in *Roe v. Wade*); 149 CONG. REC. S3600 (daily ed. Mar. 12, 2003), *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00048 (last visited Feb. 13, 2005) (showing that on March 12, 2003, Senator Harry Reid voted against the Harkin Amendment for a second time); *see also* Charles Babington, *Reid Vows to Stand Up to the GOP Issues*, WASH. POST, Dec. 19, 2004, at A1 (noting that Senator Reid "differs from his party's orthodoxy" with regard to abortion and he has voted to ban partial-birth abortions and is one of two Democrats to "oppose an amendment expressing support for the Supreme Court's 1973 Roe v. Wade decision").

22. *See* Brief of Amici Curiae in Support of Respondent for People for the American Way Foundation et al., Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), *available at* http://www.naral.org/facts/stenberg_amicus.cfm (last visited Feb. 7, 2005) (challenging partial-birth abortion laws); Brief of Amicus Curiae of 178 Organizations in Support of Planned Parenthood of Southeastern Pennsylvania, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (Nos. 91-744 & 91-102) (challenging parental consent laws); Brief of Amici Curiae of the American Civil Liberties Union et al., Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605) (challenging denial of government funding laws).

III. SENATE TRADITIONS

Third, liberal interest groups insist that it should take a supermajority of sixty senators to confirm a judicial nominee, and they viciously attack any effort to restore the traditional rules for confirming judges as a "nuclear" tactic. Yet it is their radical rewriting of Senate rules—rather than the attempt to restore constitutional traditions—that is so destructive.

The rules governing the judicial-confirmation process should be the same regardless of which party controls the White House or the Senate. They should not be subject to the whims of liberal interest groups. Yet every judicial nominee who has enjoyed the support of a majority of senators has been confirmed—until now.[23]

The Senate should reject this double standard and restore our constitutional and traditional standards for confirming judges. No one would say that, although fifty-one percent of voters can elect a Democrat to office, a sixty-percent vote is required to elect a Republican to office. Likewise, our Constitution and Senate tradition provide that a majority of senators may confirm a judicial nominee, whether the president is a Democrat or Republican. Indeed, throughout history the Senate has consistently confirmed judges who enjoyed majority but not sixty-vote support—including Clinton appointees Richard Paez,[24] William Fletcher,[25] and Susan Oki Mollway,[26] and Carter appointees Abner Mikva[27] and L.T. Senter.[28]

Yet liberal interest groups now demand that this President's judicial nominees must be supported by a supermajority of senators, or else be denied even the courtesy of an up-or-down vote, through the unprecedented use of an obstructionist tactic known as the filibuster.[29] Such tactics are dangerous to the rule of law because they politicize our judiciary and give too much power to special interest groups. As law professor Michael Gerhardt, a top Democrat adviser on the confirmation process, once wrote, a supermajority rule for confirming judges "is problematic because it

23. *See, e.g.*, John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 224–26 (2003).

24. *See id*. at 225.

25. *See id*.

26. *See id*.

27. *See* 125 CONG. REC. 26,049 (1979) (confirming Judge Mikva by a vote of 58-31).

28. *See* 125 CONG. REC. 37,474 (1979) (confirming Judge Senter by a vote of 43-25 with thirty-two senators absent for the vote).

29. *See, e.g.*, Cornyn, *supra* note 23, at 192–97.

creates a presumption against confirmation, shifts the balance of power to the Senate, and enhances the power of the special interests."[30]

There is nothing sacrosanct about the obstructionist tactic known as the filibuster. In fact, there are at least twenty-six laws on the books today which abolish the filibuster in a number of policy areas and thereby ensure that a majority of senators is sufficient to take action.[31]

Nor is there anything extraordinary about a majority of senators acting to craft Senate rules and procedures. The constitutional authority of a majority of senators to strengthen, improve, and reform Senate rules and procedures was expressly stated in the Constitution,[32] unanimously endorsed by the Supreme Court of the United States over a century ago,[33] and dutifully supported and exercised by the Senate on countless occasions ever since, as carefully documented in the next issue of *The Harvard Journal of Law & Public Policy*.[34] Such authority has also been recognized—indeed, praised—by leading Senate Democrats, including Robert Byrd[35] and Ted Kennedy.[36] And Senator Charles Schumer ac-

30. Michael Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395, 398 (1994).

31. *See* Cornyn, *supra* note 23, at 212–14.

32. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings.").

33. *See* United States v. Ballin, 144 U.S. 1 (1892).

34. *See* Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205 (2004).

35. *Id*. at 207–08. Senator Byrd is quoted as saying:

> The first Senate, which met in 1789, approved 19 rules by a majority vote. Those rules have been changed from time to time . . . . So the Members of the Senate who met in 1789 and approved that first body of rules did not for one moment think, or believe, or pretend, that all succeeding Senates would be bound by that Senate. . . . It would be just as reasonable to say that one Congress can pass a law providing that all future laws have to be passed by two-thirds vote. Any Member of this body knows that the next Congress would not heed that law and would proceed to change it and would vote repeal of it by majority vote.

Id. (citing 125 CONG. REC. 144 (1979) (statement of Sen. Byrd)).

36. *See, e.g.*, 121 CONG. REC. 3850 (1975) (statement of Sen. Kennedy). Senator Kennedy stated that,

> The notion that a filibuster can be used to defeat an attempt to change the filibuster rule cannot withstand analysis. It would impose an unconstitutional prior restraint on the parliamentary procedure on the Senate. It would turn rule XXII into a Catch XXII. It would give the two-thirds filibuster rule itself an undesirable and undeserved new lease on life.
>
> Mr. President, the immediate issue is whether a simple majority of the Senate is entitled to change the Senate rules. Although the procedural issues are complex, it is clear that this question should be settled by a majority vote.

Id.

knowledged the legitimacy of such authority at a Judiciary subcommittee hearing I chaired just two years ago.[37]

Liberal interest groups have disparaged the authority to restore Senate traditions by majority vote as a "nuclear" tactic. But what is truly nuclear is the radical alteration of the Senate confirmation process—not the attempt to restore Senate tradition by traditional means.

* * *

Two years ago, all ten Senate freshmen, Republican and Democrat alike, joined to declare that the Senate's confirmation process is badly broken and that we need a fresh start.[38] Restoring the Senate's judicial confirmation process by using honest and fair standards and procedures for judging nominees, and repudiating the extreme double standards perpetrated by liberal interest groups in Washington, would be an excellent start.

37. *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary,* 108th Cong., 1st Sess. 60 (May 6, 2003), *available at* http://www.gpoaccess.gov/databases.html (last visited Feb. 4, 2005).

> Mr. KMIEC. . . . The real constitutional injury here . . . is the entrenchment of rules being imposed from one body onto the next.
>
> Senator SCHUMER. Which *could be changed by majority vote*.
>
> Mr. KMIEC. And should be changed by majority vote . . .
>
> Senator SCHUMER. Right. That is why—I do not know why you say "imposed," because . . . the 51 Senators of the majority could propose changes in the rules.

Id. (emphasis added).

38. A copy of this letter is available on my website at http://www.cornyn.senate.gov/doc_archive/JCP/Letter%20to%20Senators%20Frist%20and%20Daschle.pdf (last visited Jan. 26, 2005). *See also* Cornyn, *supra* note 23, at 229–30.